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State v. Smith Respondent's Brief Dckt. 44587

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44587
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-FE-2016-9072
)	
ZACHARY S. SMITH,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Smith failed to establish that the district court abused its discretion by imposing a unified sentence of seven years, with two years fixed, upon his guilty plea to possession of heroin?

Smith Has Failed To Establish That The District Court Abused Its Sentencing Discretion

While on probation for burglary, Smith used methamphetamine and heroin and went “roaming” around an apartment complex while under the influence. (PSI, pp.15, 96-

97.¹) An officer contacted Smith and noted that Smith appeared “to be under the influence of a drug but he stated he did not have anything in his system and that he was ‘freaking out’ from the new Pokémon game”; the officer subsequently instructed Smith to ‘proceed home or to his friends [sic] house.” (PSI, p.97.)

Later the same night, Smith went to a stranger’s home and began “smashing [the] door handle” and “banging and kicking on the door” of the residence. (PSI, pp.97, 102.) When officers responded, Smith “had just opened the door” of a vehicle that did not belong to him and whose owner was unknown to him. (PSI, p.97.) He admitted to officers that he had recently injected “approximately 3.5 points” of heroin and led officers to his friend’s apartment to retrieve his belongings, which included a duffle bag and a backpack that an officer had previously seen Smith carrying. (PSI, pp.97, 103.) Smith consented to a search of his bags, in which officers located a loaded .380 handgun, a “lockbox safe,” and a metal spoon with brown residue. (PSI, pp.97, 103, 113.) Inside the safe, officers found Smith’s American Express card, a plastic baggie containing methamphetamine, “dark soaked cotton balls” with heroin residue, “numerous receipts and lotto tickets,” “six .380 bullets and a magazine,” and a coin purse containing “numerous empty plastic baggies, and two plastic pieces with a white, hard, powdery substance in them.” (PSI, pp.96, 103-04, 113.) When officers attempted to handcuff Smith, he “jerked his hands away and took off running.” (PSI, p.113.) Officers chased Smith until he had “almost box[ed] himself in” and the officers were able to arrest him at taser-point. (PSI, p.98.)

¹ PSI page numbers correspond with the page numbers of the electronic file “Smith 44587 psi.pdf.”

The state charged Smith with unlawful possession of a firearm, possession of heroin, possession of methamphetamine, possession of Buprenorphine, resisting or obstructing officers, possession of drug paraphernalia, and using or being under the influence of a controlled substance. (R., pp.38-40.) Pursuant to a plea agreement, Smith pled guilty to possession of heroin and the state dismissed the remaining charges and agreed to not file a persistent violator enhancement, to recommend a unified sentence of seven years, with three years fixed, and also to recommend that Smith's sentence in this case run concurrently with his sentence in the case for which he was on probation. (R., pp.46, 49.) The district court imposed a unified sentence of seven years, with two years fixed. (R., pp.60-62.) Smith filed a notice of appeal timely from the judgment of conviction. (R., pp.63-65.)

Smith asserts his sentence is excessive in light of his "recognition of his substance abuse problem," "desire for treatment through a 12-step program," "ability to get a job if he could stay sober," and purported remorse. (Appellant's brief, pp.3-6.) The record supports the sentence imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show

the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for possession of heroin is seven years. I.C. § 37-2732(c)(1). The district court imposed a unified sentence of seven years, with two years fixed, which falls well within the statutory guidelines. (R., pp.60-62.) On appeal, Smith contends that his sentence is excessive because he has acknowledged his substance abuse problem and desires treatment, he could get a job “if he could stay sober,” and he has expressed remorse. (Appellant’s brief, pp.3-6.) However, Smith has been abusing illegal drugs for approximately 15 years and has participated in numerous inpatient and outpatient treatment programs, none of which have curtailed his substance use. (PSI, pp.1, 7, 15, 157.) He has a history of failing to follow through with treatment and he acknowledged that “being on supervision does not always act as a

deterrent from stopping him from using drugs” and that he resumes his drug use “almost immediately” after he is released into the community. (PSI, pp.7, 15, 19, 190.) He was on community supervision at the time that he committed the instant offense and had failed to enroll in aftercare treatment as required. (PSI, p.15.) At sentencing, the district court articulated its reasons for imposing Smith’s sentence, including Smith’s continuing drug abuse and criminal offending, the risk he presents to the community, and his failure to rehabilitate despite multiple prior treatment opportunities. (Tr., p.26, L.13–p.29, L.20.) The state submits that Smith has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm Smith’s conviction and sentence.

DATED this 28th day of June, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of June, 2017, served a true and correct copy of the attached RESPONDENTS BRIEF by emailing an electronic copy to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

<p style="text-align: center;">25</p> <p>1 factors of my life that keep me here. More of the 2 solution.</p> <p>3 So my plan I'm proposing to you as far 4 as what my direction is no matter what the courts 5 put today is sobriety. But I'm asking that I get 6 an opportunity to hopefully hit a work center if 7 prison is imposed, so I can work a 12-step program 8 in structured environment with AA member, a 9 sponsor. And also so I can build better 10 relationships with my family, people that I've 11 hurt.</p> <p>12 And that's basically kind of like where 13 I am at with my life. To try to reintegrate back 14 into society like the right way. Because I don't 15 want to come back here and do this again. I'm 16 tired of hurting people. I hurt my family. And I 17 do things like I take those options away from them 18 to be in my life. I force them to have to come to 19 an institution to be a part of my life. And 20 that's not fair. Like, I am taking memories away. 21 I am taking a grandson away from my grandfather 22 and grandmother, a significant other away from a 23 significant other. Like, I am taking from people. 24 I am tired of it. Like, I don't want to be here. 25 I don't want to have to like tell you</p>	<p style="text-align: center;">27</p> <p>1 have been building up for yourself which is a 2 pretty lousy record. And what it does is it does 3 put you in a spot where anybody looking at it is 4 going to say I need to see some proof that you are 5 committed to change and I don't see it yet. 6 Because that's quite plain where you are right 7 now. Is you have been addicted for a long time. 8 You have a serious criminal record. Criminal 9 record is at least influenced by your prior 10 addiction.</p> <p>11 Now, I think you're right. You have 12 got to move past just talking about change and you 13 have to move to actually doing it. My experience 14 is that people vary on when they truly hit that 15 point. And I would say it is impossible at this 16 point to say if you're there. Those are the right 17 words to say. But, I mean, I'm pretty sure that 18 you have been at least a ton -- if you are like a 19 lot of people you've been at times where not only 20 were you saying the right words but you weren't 21 believing them and you weren't doing all the steps 22 that you needed to do to carry it through.</p> <p>23 And that's -- it is a tough path that 24 you're on and you're addicted to a pretty serious 25 drug. And it is very rough to deal with that</p>
<p style="text-align: center;">26</p> <p>1 who I am or what I am going to do and that my life 2 is changing different. Like I want to do it 3 through action and not just words. I know that I 4 have a problem in my life and it is a struggle for 5 my life and I will struggle it everyday because I 6 am an addict, but I am not a lost addict. And I 7 have hope. And today my motivation is internal. 8 It is for me. It is not for anyone else. Thank 9 you.</p> <p>10 THE COURT: Is there a legal cause why we 11 should not proceed?</p> <p>12 MR. MARX: No, Your Honor.</p> <p>13 THE COURT: Well, you know, you have been 14 addicted for a long time. You were obviously way 15 wiggled out when this offense happened because 16 you're banging on somebody's door at 3:30 in the 17 morning and you were basically out of your mind 18 because of your heroin use. You have been 19 addicted for most of your life really.</p> <p>20 THE DEFENDANT: Yeah.</p> <p>21 THE COURT: And you've had lots of treatment 22 options. You've had lots of chances. Your 23 addiction has led you to commit -- well, I don't 24 know if it has so much led you to commit, but 25 definitely been connected with the record that you</p>	<p style="text-align: center;">28</p> <p>1 addiction. It is possible to deal with that 2 addiction, but it is hard and I recognize that. I 3 also recognize that you do present an ongoing risk 4 to the public because you commit crimes when you 5 are using heavily.</p> <p>6 So what I think -- and I am 7 particularly concerned about some of the things 8 found in your belongings. I think you're right. 9 If you take in deeply a lot of the things that you 10 learn, you can make a change. But I get to say it 11 is not apparent from what's before me that you're 12 really at that point.</p> <p>13 And so what seems to me to be fair is 14 you need a ton of sobriety for sure and I don't 15 think anybody deeply as addicted as you are is 16 going to be successful unless the yearning level 17 is down more. And I do think that means that you 18 are going to have to be kept away from it for a 19 while. Because I think that gives you the ability 20 then to increase your power and to deal with it.</p> <p>21 But you have got to lessen the amount 22 of drugs in your life. You have got to eliminate 23 them so you can get to the point where you really 24 can put together what you're doing and what you 25 say you want to do. And I hope you do.</p>

Nicole L. Julson, Official Court Reporter, Ada County, Idaho

<p style="text-align: center;">29</p> <p>1 Like I said, I have seen people change 2 at all sorts of times of their lives. I have seen 3 people who are very, very addicted change. You 4 have to be willing to work at it.</p> <p>5 And what I am going to do is based on 6 your plan, I am going to impose a sentence of two 7 years fixed followed by five years indeterminate 8 for a seven year sentence. I will make it 9 concurrent with Canyon County so that you can earn 10 your way out. But I think quite frankly you are 11 going to need a time of greater sobriety before it 12 is really practical to expect that you can 13 physically resist an addiction that you've been 14 building up for such a long time.</p> <p>15 So I think that's fair. I think there 16 does need to be a penalty, but I think that 17 balances it with giving you a chance to get 18 cleaner and then try again. And it's definitely 19 worth doing. You've articulated the reasons and 20 now it is up to you to do the work.</p> <p>21 THE DEFENDANT: Absolutely.</p> <p>22 THE COURT: Now, you do have 42 days in 23 which to appeal. Any questions? I don't see any 24 basis to sign on costs. I think there is probably 25 enough financial burdens in existence already.</p>	<p style="text-align: right;">31</p> <p>1 <u>CERTIFICATE OF REPORTER</u> 2 3 STATE OF IDAHO) 4) ss. 5 COUNTY OF ADA) 6 7 I, NICOLE L. JULSON, Official Court 8 Reporter of the County of Ada, hereby certify.</p> <p>9 That I attended the hearing in the 10 above-entitled matter and reported in stenograph 11 the proceedings had thereat. That I thereafter, 12 from the shorthand record made by me at said 13 proceedings; that the foregoing 30 pages 14 constitutes said transcript and that said 15 transcript contains a full, true, complete and 16 correct transcript of said proceedings.</p> <p>17 18 IN WITNESS WHEREOF, I have hereunto set 19 my hand this 10th day of January, 2017. 20 21 22 23 24 25</p> <p style="text-align: right;">Nicole L. Julson, CSR, RPR Official Court Reporter CSR No. 699 200 W Front Street Room 2174 Boise, Idaho 83702 (208) 287-7585</p>
<p style="text-align: center;">30</p> <p>1 And with as hard as it is for people to get a job 2 with a felony, I am not going to sign the order 3 for restitution.</p> <p>4 MR. MARX: Thank you, Your Honor.</p> <p>5 (Proceedings concluded 4:50 p.m.)</p> <p>6 -oooOooo-</p> <p>7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	

Nicole L. Julson, Official Court Reporter, Ada County, Idaho